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Equitable Enforcement of Implied Restrictions on the Use of Land - Turner v. Brocato

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Comments and Casenotes

Equitable Enforcement Of Implied Restrictions On The Use Of Land

Turner v. Brocato[1]

The parties plaintiff were prior purchasers from a common grantor of building lots in an expensive Baltimore subdivision known as "Poplar Hill". Each had taken his lot subject to use restrictions which, *inter alia,* limited construction to one single-family dwelling house. The common grantor reserved the right, in those deeds which fully recited the restrictions, to waive some of them, and to except all of them from his remaining land outside of the immediate section of the subdivision of which the land being conveyed was a part. The grantor recorded a plat upon purchase in 1927 showing sections A and B as subdivided with section C still vacant. After three years he made a revised plat, showing no sections and marking off 12 additional lots in the once-vacant section C. This plat was not recorded, but was referred to in deeds which were recorded. Restrictions were imposed in deeds to these new lots by reference to prior deeds of lots in sections A and B. At the extreme western end of section C was a 500 x 100 foot finger of land bounded on the west by Falls road, and contiguous to the rest of the tract for only 150 feet on its northeastern side; this finger was not subdivided on either of the plats. The southernmost third was sold without restrictions to a storekeeper who converted it into a parking lot. The middle third remained in the grantor. The northern 150 feet were purchased by defendants in 1953 from the original grantee, clear of any express restrictions; they started excavation, intending to erect a cleaning establishment. The plaintiffs brought a bill praying for a declaration that defendants' land was part of the common grantor's Poplar Hill development and, as such, restricted to non-commercial use. Their claim was that the defendants, as subsequent purchasers with notice, took subject to the restrictions which the grantor had, by express deed or necessary implication, put upon his own land as a reciprocal burden to induce plaintiffs to buy the restricted lots. The trial court dismissed the bill on the ground that the parties plaintiff had failed to meet their burden of showing that the grantor intended to im-

[1] 206 Md. 336, 111 A. 2d 855 (1955).

pose the restrictions for the common benefit of all Poplar Hill landowners, hence, that the benefits of these restrictions were merely personal to the grantor and could in no way burden his power to convey any of his remaining land free and clear.

Speaking through Hammond, J., the Court of Appeals in reversing the trial court, Collins, J., dissenting, *Held:* (1) Plaintiffs having met their burden of showing a general plan of development, the rule of evidence favoring freedom of the land must accede to the rule favoring the intent of the parties; (2) Since the common grantor sold the restricted lots with intent to benefit all landowners in the Poplar Hill development, from his sales to prior purchasers there arose an implied reciprocal restriction, binding upon his remaining land, and enforceable against subsequent purchasers with notice; (3) The Statute of Frauds cannot bar the enforcement of such implied restrictions; (4) The defendants, being thoroughly familiar with the physical layout of Poplar Hill, were put on notice of the implied reciprocal restriction upon the common grantor's remaining land from the deeds of record in which the grantor expressly restricted the lots sold to the parties plaintiff and other prior-purchasing residents of Poplar Hill.

In attempting to determine what effect this case will have upon future Maryland litigation on the restricted use of land, two considerations are brought into focus: (1) this is the first time the Court of Appeals has expressly followed the doctrine of implied reciprocal restrictions; (2) in so doing, the Court has, as indicated by Judge Collins' dissent, raised some doubt as to some formerly well settled rules on the burden of persuasion and on notice sufficient to bind a purchaser.

THE THEORETICAL BASIS OF THE SUIT AND THE STATUTE OF FRAUDS

That restrictions on the use of land might be enforced in equity was first recognized in the English case of *Tulk v. Moxhay*.[2] The decision went off not on grounds of real property law but upon the old maxim that "equity does what ought to be done". Lord Cottenham said that:

> ". . . the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."

[2] 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

> "... if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."[3]

As frequently happens when American courts try to latch on to an English *dictum*, a good deal of confusion and scholarly hair-splitting has issued out of this case.[4] Does a covenant for restricted use of land give rise to a mere contract right[5] specifically enforceable in equity against a purchaser with notice; or does it create an equitable negative easement,[6] an incorporeal property interest in the land of the covenantor? The American courts have divided sharply on the issue.[7] So have the scholars.[8] With one exception,[9] the Maryland cases have rested flatly on the property theory, without analyzing the issue.[10]

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[3] *Ibid*, 777, 778, 1144.

[4] The logical "ring-round-the-roses" into which one can get when trying to wrestle with this case is illustrated by a note in 31 Harv. L. Rev. 876 (1918).

[5] See Reno, *The Enforcement of Equitable Servitudes in Land*, 28 Va. L. Rev. 951, 973 (1942).

[6] *Ibid*, 975.

[7] Favoring the contract theory: Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81 (1891); Hall v. Solomon, 61 Conn. 476, 23 A. 876 (1892); Johnson v. Mt. Baker Park Presbyterian Church, 113 Wash. 458, 194 P. 536 (1920); Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930); McComb v. Hanly, 132 N. J. Eq. 182, 26 A. 2d 891 (1942). Favoring the easement notion: Sprague v. Kimball, 213 Mass. 380, 100 N. E. 622 (1913); Flynn v. New York, W. & B. R. Co., 218 N. Y. 140, 112 N. E. 913 (1916); Ham v. Massasoit Real Estate Co., 42 R. I. 293, 107 A. 205 (1919); Hege v. Sellers, 241 N. C. 240, 84 S. E. 2d 892 (1954). That English cases have embraced the property theory: see 3 TIFFANY, REAL PROPERTY (3d ed., 1939), Secs. 861, 486 and 490.

[8] See authorities footnoted in a note, *Restrictions Against Occupancy — Existence of a General Plan*, 8 Md. L. Rev. 307, 310 (1944).

[9] Levy v. Dundalk Co., 177 Md. 636, 646, 11 A. 2d 476 (1940).

[10] The process has been one of quotation and citation, completely removed, until the present case, from the war of theories. The first case on the subject, Thruston v. Minke, 32 Md. 487, 494 (1870), quoted a Massachusetts decision to determine the right as an easement. The next case, Halle v. Newbold, 69 Md. 265, 269, 14 A. 662 (1888), quoted the *Thruston* case. Newbold v. Peabody Heights Co., 70 Md. 493, 500, 17 A. 372 (1889), cited both prior cases and introduced *Tulk v. Moxhay*, *supra*, n. 2, to the Maryland Reports with a long quotation, in support of the easement notion. These cases became the citational backbone of later decisions. Judge Offutt, in his monumental opinion of McKenrick v. Savings Bank, 174 Md. 118, 122, 197 A. 580 (1938), noted in 2 Md. L. Rev. 265 (1938), prior to briefing each important Maryland decision on the subject, quoted the *Thruston* case as setting the right in the nature of an easement. This opinion became the guide to more recent cases. Schlicht v. Wengert, 178 Md. 629, 635, 15 A. 2d 911 (1940); Scholtes v. McColgan, 184 Md. 480, 488, 41 A. 2d 479 (1945). In Raney v. Tompkins, 197 Md. 98, 101, 78 A. 2d 183 (1951), the question of the enforcement right was given such terse treatment as to suggest that it was almost too stale for mention.

Where, as in the instant case, one is confronted with the broad problem of the prior purchaser's right to enforce the burden against a subsequent purchaser from the common grantor, both the contract and property theories run into serious logical obstacles to their application.[11] In order to keep the gravamen of the problem down to earth, one writer has suggested that the most satisfactory solution is to treat the prior purchaser's enforcement right as completely *sui generis,* as an equitable right enforceable in and of itself, and not derived from any settled theory of property or contract law.[12] This eminently sensible idea was referred to with favor by Judge Hammond in the present case.[13]

Determination of the basis of the enforcement right becomes especially important when, as here, the particular problem is the prior purchaser's right to enforce a restriction *wholly implied* against the land of a subsequent purchaser, *i.e.,* where there is no deed of record in which the common grantor expressly reciprocally bound his remaining land to the restrictions he imposed on the prior purchaser, or in which he directly imposed the same restrictions upon the land of the subsequent purchaser. If the enforcement right is in the nature of a negative easement appurtenant to the prior purchaser's land against the servient land of the subsequent purchaser, this right must be derived from an express grant in the earlier deed, whereby the common grantor covenanted to bind his remaining land or to insert like restrictions in later deeds. If, however, the negative easement must be implied from an oral promise of the grantor to restrict his remaining land, it is an oral contract for the sale of an interest in land, unenforceable under section 4 of the Statute of Frauds and falls under the rule that all prior oral promises are merged into the deed.[14]

On the other hand, if the enforcement right is one of contract only, enforceable in equity against purchasers of land affected by the contract right, it would still seem unenforceable under section 4 as an oral contract not capable of performance within one year.[15] This difficulty could be avoided, however, by the application of the English rule that this section of the Statute does not apply to those

[11] See 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.30, 424, *et seq.;* Reno, *op. cit., supra,* n. 5, 973, *et seq.* See also CLARK, REAL COVENANTS (2d ed., 1947), Ch. VI, 171, *et seq.;* TIFFANY, *op. cit., supra,* n. 7, Sec. 861.

[12] 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.30, 427.

[13] 206 Md. 336, 347, 111 A. 2d 855 (1955).

[14] Sprague v. Kimball; Ham v. Massasoit Real Estate Co.; Hege v. Sellers, *supra,* n. 7; 38 Harv. L. Rev. 967 (1925).

[15] 38 Harv. L. Rev. 967, 970 (1925).

bilateral contracts in which one side has been completely performed within one year.[16]

Finally, if the right is *sui generis,* the Statute is inapplicable.

It is difficult to quarrel with the Court's adoption of the doctrine of implied reciprocal restrictions, as enunciated in *Sanborn v. McLean*[17] and formulated in the American Law of Property;[18] the doctrine is not an illogical or unreasonable extension of the Maryland law on equitable enforcement of restrictive covenants.[19] The Court's treatment of the Statute of Frauds, however, is an entirely different matter. As stated previously, Maryland has been a property theory state, as a simple matter of *stare decisis.*[20] In the present case the Court, for the first time, went beyond mere decisions and took a long look at the theoretical basis of the suit. It had three predictable alternatives: stick with the property theory and reject the *Sanborn* doctrine under the Statute of Frauds; adopt the doctrine under the contract theory, as New Jersey[21] has done; declare the right *sui*

[16] Reno, *The Enforcement of Equitable Servitudes in Land,* 28 Va. L. Rev. 1067, 1094 (1942).

[17] 233 Mich. 227, 206 N. W. 496 (1925). Other leading cases are La Fetra v. Beveridge, 124 N. J. Eq. 24, 199 A. 70 (1938) and McComb v. Hanly, *supra,* n. 7, but the enforcement of implied restrictions is not new: Tallmadge v. East River Bank, 26 N. Y. 105 (1862); Schickhaus v. Sanford, 83 N. J. Eq. 454, 91 A. 878 (1914).

[18] *Supra,* n. 12, Sec. 9.33.

[19] This does not mean the extension was predictable. Cases of first impression in property law always have their unsettling effects. True, of the thirty-odd cases on the subject of restrictions, few have held the restrictions enforceable. There have been some "tough" decisions: Wood v. Stehrer, 119 Md. 143, 86 A. 128 (1912); Ringgold v. Denhardt, 136 Md. 136, 110 A. 2d 321 (1920). But, as stated in the present case, *supra,* n. 13, 353, this history of non-enforcement "has been because of the facts, not the law". The logic of the adoption is attested by a long string of *dicta* beginning with Peabody Heights Co. v. Willson, 82 Md. 186, 199, 32 A. 386, 1077 (1895) and culminating in McKenrick v. Savings Bank, *supra,* n. 10, 128, to the effect that "if in such a case it appears that it was the intention of the grantors that the restrictions were part of a uniform general scheme or plan of development and use which should affect the land granted and the land retained alike, they may be enforced in equity, . . ." If this is true, there is no reason why implied as well as express restrictions should not be enforced, presuming the implication is clear. The reasonableness of the adoption is reflected from present urban conditions. Attractive residential areas are desirable enough, but they are hard to maintain, harder to create. "Urban Renewal", *Evening Sun* (Baltimore), November 29, 30, December 1, 1955. Since public zoning is too vagrant for the job, the most sensible way to stop the old routine of "blockbusting" is to enforce clearly intended private zoning arrangements. Where the neighborhood is plainly a restricted residential area, there may be clever legal arguments against enforcing implied restrictions, but there are no equitable ones.

[20] *Supra,* n. 10.

[21] La Fetra v. Beveridge, *supra,* n. 17. It has been suggested that *Sanborn* did this, in view of the fact that it didn't even consider the Statute. This suggestion is hard to square with the Court's repeated use of the phrase "reciprocal negative easement". 2 AMERICAN LAW OF PROPERTY (1952), Sec.

generis, the Statute inapplicable and the doctrine in force. The Court did none of these; it executed a back-door exit by saying, ". . . it would serve no good purpose to decide the true, underlying . . . principle . . .",[22] then quoted[23] some neatly edited Cardozo *dicta* to the effect that, even though the right has developed into an equitable property interest, its origin under *Tulk v. Moxhay*[24] was contractual,[25] and, for purposes of the Statute, its origin will determine its nature. Since the obvious purpose of the Court was to adopt the *Sanborn* rule without letting the Statute get in its way, it would certainly seem that the adoption of the *sui generis* theory would have been a cleaner way of getting the job done.[26]

PRACTICAL PROBLEMS OF PROOF

The basic essential of victory in any complainant's case for the enforcement of land use restrictions is the massing of proof sufficient to overcome a presumption in evidence resolving all doubts in favor of the free, unrestricted use of land. In Maryland, the "freedom presumption" has been strictly enforced.[27]

As a prerequisite to relief under this doctrine of implied reciprocal restrictions, the enforcing party must prove: first, his general right of enforcement based upon evidence showing, (1) intent of the common grantor to develop the land according to a general plan, (2) that such intent was

9.33, 432, suggests that the justification for ignoring the Statute may be found in the fact that the Court was applying by implication only those restrictions expressly recited in the prior purchaser's deed, which writing would satisfy the Statute.

[22] 206 Md. 336, 347, 111 A. 2d 855 (1955).

[23] *Ibid.*

[24] 2 Phil. 774, 41 Eng. Rep. 1143 (Ch. 1848).

[25] Whatever merits there may be to the contract theory, the conclusion reached by Chief Judge Cardozo in Bristol v. Woodward, 251 N. Y. 275, 167 N. E. 441 (1929), that its birthplace was *Tulk* is clearly erroneous. Lord Cottenham refused even to inquire whether there was an adequate remedy at law, *i.e.*, whether the covenants would run at law. Equity often does this where real property rights are involved, but it always looks to the adequacy of legal remedy before considering the specific performance of contracts.

[26] Only in an eminent domain proceeding against restricted land where the owners of benefited land seek compensation for their condemned benefit will it have to be decided, once and for all time, whether the right is one of property (requiring compensation) or one of contract (released by condemnation for impossibility of performance). Flynn v. New York, W. & B. R. Co., 218 N. Y. 140, 112 N. E. 913 (1916); Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080 (1930); 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.40.

[27] Wood v. Steher; Ringgold v. Denhardt, *supra*, n. 19; Sowers v. Holy Nativity Church, 149 Md. 434, 131 A. 785 (1926); McKenrick v. Savings Bank, 174 Md. 118, 197 A. 580 (1938); Schlicht v. Wengert, 178 Md. 629, 15 A. 2d 911 (1940); Matthews v. Kernewood, Inc., 184 Md. 297, 40 A. 2d 522 (1945).

carried out, *i.e.*, that the planned development exists, (3) that the common grantor intended to include in this development the property against which enforcement is sought;[28] second, his particular right to enforce these implied reciprocal restrictions based upon evidence showing (1) that, knowing of this intent to develop, he relied[29] upon oral representations by the common grantor that the remaining land would be bound reciprocally to the same restrictions expressly imposed in complainant's deed, or that he would insert like restrictions in all subsequent deeds, and (2) that the defendant purchased with at least constructive notice[30] of the restrictions.

The rules governing the type of evidence that may be used to establish these points are quite liberal.[31] Proof of the grantor's intent to create a development is a question of fact,[32] which may be answered from one or more of three types of evidence, depending on which the court may deem most important: (1) express language in his deeds; (2) his acts and statements in selling or trying to sell lots; (3) "notice" evidence, *e.g.*, uniformity of the restrictions in the deeds, the physical appearance of the development, the recording of a plat. Of course, once the evidence establishes the existence of a uniform housing development, the complainant is well on his way to proving the intent to restrict according to a plan; that is, for practical purposes, proof of the grantor's intent and of the plan's existence are virtually inseparable problems.

Turning to the present case, there was no doubt as to the developer Charles Fenwick's intent to establish Poplar Hill as a uniformly restricted residential area: the language of the deeds, his recording of the first plat, his distribution of copies of the second unrecorded plat and of lists of the restrictions, his placing of a sign about the development on

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[28] Rose v. Kenneseth Israel Congregation, 228 Minn. 240, 36 N. W. 2d 791 (1949).

[29] Proof of reliance is necessary to any prior purchaser's case of enforcement under a general plan. Summers v. Beeler, 90 Md. 474, 481, 45 A. 19 (1899); Bristol v. Woodward, *supra*, n. 25; 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.30, 424, 426; comment, *Equitable Servitudes — The Running of Covenants in Equity*, 2 Md. L. Rev. 265, 275 (1938). There was no question about it in this case, so it is not discussed. Under Tallmadge v. East River Bank, 26 N. Y. 105 (1862), it would have been enough to show that the grantor displayed a plat as an inducement to sale.

[30] Sanborn v. McLean, 233 Mich. 227, 206 N. W. 496 (1925); 3 TIFFANY, REAL PROPERTY (3d ed., 1939), Sec. 863, 492, cases cited in fn. 89. That equity requires proof of notice before enforcing any restriction has been accepted unequivocally since Tulk v. Moxhay, *supra*, n. 24.

[31] Bristol v. Woodward, *supra*, n. 25; Schlicht v. Wengert, *supra*, n. 27; TIFFANY, *op. cit.*, *supra*, n. 30, Sec. 868.

[32] Summers v. Beeler, *supra*, n. 29, 482.

the defendant's land, the "high class" look of the area — all bore out this contention.

Yet, in dealing with his intent to include the defendants' land in this development the Court did a startling thing. At the very outset[33] of his opinion, Judge Hammond made a finding that this land was a part of Poplar Hill, and went on to hold later that:

> "Here, the appellants have met the burden of proof as to a general plan of development by clear and satisfactory evidence. This being so, the principle that doubt must be resolved in favor of the alienability of land, free and unfettered, does not control. . . . This rule of construction bows always to the more fundamental rule that wherever possible effect will be given to an ascertained intention of the parties."[34]

The effect of this maneuver was to take the proof on "intent to include" out from under the old "freedom presumption" and to raise a presumption that the grantor intended to include in his general plan all platted land contiguous to lots restricted. Since the platting of this finger of land with the rest of the tract, the placing of the sign on defendants' part of the finger, and the fact of its 150 foot abutment on Poplar Hill lot No. 78 were the only bits of evidence favoring "intent to include", only under such a presumption could these facts be allowed to overbalance contrary evidence of the commercial use of the southern part of the finger, of the land's valuelessness as residential property,[35] and of Fenwick's failure ever to subdivide or restrict the finger. One is left with a question whether this application, in fact at least, of two opposite presumptions to two dif-

[33] 206 Md. 336, 345, 111 A. 2d 855 (1955).

[34] *Ibid*, 352.

[35] The entire finger rose away from Falls road at something like a thirty degree angle; except for the surface it was solid rock. The parking lot to the south had been created by excavation, which was the only way to make the surface usable. While the excavation might permit commercial use, it seems unlikely that, even if the entire area had been residential, anyone would put up a house with its face right on the street and its back to a thirty foot rock wall. Aside from that, the area was shown to be more commercial than not. If land abutting restricted residential property becomes commercial in character, the restrictions will not be enforced if it is apparent that the purpose of the general plan can no longer be accomplished. Needle v. Clifton Realty Corp., 195 Md. 553, 73 A. 2d 895 (1950), noted in 13 Md. L. Rev. 219 (1953); 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.39. Since this was not discussed in the present case, it must be assumed that the Court considered the facts inappropriate to the application of such a rule, or that counsel for the defendants chose not to put it in issue, perhaps on the consideration of Middleton Realty v. Roland Park, 197 Md. 87, 78 A. 2d 200 (1951).

ferent but closely allied phases of the grantor's intent is to be construed as creating a new rule of evidence.

This finding of the developer's intent raises the second major problem of proof required of a complainant: that of establishing, as a matter of law, that the defendant was on constructive notice[36] of the restrictions. In Maryland one is bound by every express encumbrance on his property which he could have found in the records.[37] If the grantor covenanted in a deed to a prior purchaser to restrict his remaining land, any subsequent purchaser from him would be bound by the restrictions imposed in the prior deed, whether they were in his direct chain of title or not, assuming proper proof of a general plan. The Court of Appeals, by permitting enforcement of restrictions wholly implied against the present defendants, has carried record notice one notch further. Even though a subsequent purchaser be without actual knowledge of the restrictions, and though he can find nothing of record expressly encumbering his property, he is nevertheless bound by notice of express restrictions imposed by the grantor upon lots previously deeded away under the general plan; because *these* restrictions, though they do not concern the subsequent purchaser's land, raise the implication that the grantor intended to restrict the entire development. This implication of reciprocity is the core of the implied restriction doctrine.[38] It is readily observed, then, that this doctrine, as applied by the Court, supplies its own built-in record notice mechanism, which will add to the burden of thorough title searching. As a corollary to this mechanism, since it must be determined whether the recorded restrictions on other lots were imposed under a general plan so as to make conclusive the implication of reciprocity raised by them, a subsequent purchaser is bound by the physical condition of the neighborhood, as a matter of inquiry notice.[39]

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[36] *Supra*, n. 30.

[37] Lowes v. Carter, 124 Md. 678, 93 A. 216 (1915). A contrary rule confines notice to the direct chain of title. Buffalo Academy of The Sacred Heart v. Boehm Bros., 267 N. Y. 242, 196 N. E. 42 (1935); Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. of Pa. L. Rev. 125, 173 (1944); note, 16 A. L. R. 1013. The Maryland rule only means that, as a title searcher checks the description of a grantor's conveyances, he must go on to check the body of the deed for such unusual items as restrictions.

[38] Sanborn v. McLean, *supra*, n. 30; 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.33, 431.

[39] The courts in *Sanborn* and the instant case decided that the physical condition of the neighborhood put the subsequent purchasers on notice to go look at the record and find the restrictions. It has been suggested that record notice binds one to go look at the land because, as a practical matter, title searchers generally have little occasion to view the premises, and, even if they do, the records come first. At any rate, the purchaser will be bound, no matter at which end of the notice machine he starts first.

However, the present case discloses two varieties of notice: that of the existence of a general plan, and that of the intended inclusion of defendants' property in that plan. In neither the majority opinion nor the dissent was this distinction drawn, but the easy proof of notice of the general plan was construed as notice of inclusion of defendants' land thereunder. In other words, the burden was shifted to defendants, once plaintiffs had shown notice of the general plan. This conclusion was inescapable, because the same facts were determinate of both intent and notice. The entire case for the plaintiffs on notice of inclusion of defendants' property in the general plan rested upon constructive notice from the sign and record notice of the first plat with the original deed to the grantor, Fenwick, both of which included the finger. It was not proved that any of the defendants actually saw a copy of the second, unrecorded plat; the Court said they were put on inquiry notice of that plat by references to it in the recorded deeds of prior purchasers. But that is irrelevant, because even if they had seen it, it would not have disclosed the finger as a subdivided, let alone integrated, part of Poplar Hill. Inspection of the premises showed only that it was contiguous on its eastern boundary to a restricted lot, that it was located next to a restricted development but in a commercial neighborhood, that it was a topographical impossibility as a housing site, that the southern part of the finger was used as a parking lot. Though defendants' reasonableness could be no issue, it seems incredible that they would knowingly have purchased a deed to litigation.[40]

Judge Collins said in *Matthews v. Kernewood, Inc.*,[41] "[I]mplied restrictions have never been favored by this Court." Evidently this is no longer true. It is one thing to enforce implied restrictions and quite another to favor them. This case represents not just a sudden departure from prior Maryland holdings;[42] it is the most extreme decision

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[40] This raises a question companion to the intent dilemma: is the Court's treatment of notice to be construed as creating a new rule of law as to the extent to which a purchaser may be bound? Even if the shifting of burdens of proof does not create a new rule of evidence, is it nevertheless established that, if notice of a general plan is proved, a subsequent purchaser is on record notice of inclusion if his land was part of either/both the recorded plat or/and the original deed to the common grantor from which the general plan developed, regardless of other proofs that there was no notice, actual or constructive, of inclusion?

[41] 184 Md. 297, 305, 40 A. 2d 522 (1945).

[42] See *supra*, n. 27. See also two recent "liberal" decisions: Martin v. Weinberg, 205 Md. 519, 109 A. 2d 576 (1954); Adams v. Parater, 206 Md. 224, 111 A. 2d 590 (1955).

in the American law of implied restrictions.[43] The doctrine is one of equitable relief; it would seem only just that enforcement of implied restrictions should be more difficult than that of express. The enforcement should be strictly limited to those cases in which the implication stands out with all the unassailable prominence of a village church spire — to those cases where the equities of the enforcing party are weighty and clear. The basis for the doctrine is a public policy favoring private zoning arrangements, which are always more secure than public zoning ordinances. But that policy must always be expected to stand beneath the policy favoring unrestricted use of property by its owner,[44] when the two close in a conflict of doubts. This is the first case to reverse that order.

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[43] *Cf.* Price v. Anderson, 318 Pa. 209, 56 A. 2d 215, 219 (1948), where it was said that:

> "But the mere fact that a grantor imposes restrictions on parts of a tract which he sells does not raise any inference that he means thereby to obligate himself to restrict the remainder of his property; in every such case there must appear definite evidence of a purpose to bind the remaining land, and that purpose must be clearly made known to the grantees."

This approach to implied restrictions is manifest in Rose v. Kenneseth Israel Congregation, 288 Minn. 240, 36 N. W. 2d 791 (1949) and Baederwood, Inc. v. Moyer, 370 Pa. 35, 87 A. 2d 246 (1952). As to the general stinginess of enforcement, see cases noted in 60 A. L. R. 1216, 144 A. L. R. 916.

[44] In 2 AMERICAN LAW OF PROPERTY (1952), Sec. 9.29, 416, it is suggested that restrictions should be favored on the ground that they actually heighten alienability in a residential area. This does not answer the right of a property owner to free use of his land.